No. 15041

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

MA CHUCK MOON and MA CHUCK WOON,
Appellants,

vs.

JOHN FOSTER DULLES, Secretary of State of the United States; HERBERT BROWNELL, JR., Attorney General of the United States; and JOHN P. BOYD, District Director of Immigration and Naturalization,
Appellees.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

HONORABLE WILLIAM J. LINDBERG, *Judge*

BRIEF OF APPELLEE

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JURISDICTIONAL STATEMENT

Jurisdiction of the District Court is conferred by the provisions of Section 1503(a), Title 8, U.S.C. and Section 2201, Title 28, U.S.C., and on this Court by Section 1291, Title 28, U.S.C.

STATUTES INVOLVED

The statutes involved are the Immigration and Nationality Act of 1952, Section 360, 66 Stat. 273, 8 U.S.C. 1503(a); the Nationality Act of 1940, Section 503, 54 Stat. 1171, 8 U.S.C. 903; and Rule 41(b), Federal Rules of Civil Procedure.

The applicable portions of the statutes are set forth in pertinent detail in appellees' Argument herein.

STATEMENT OF THE CASE

The appellants herein brought a prior action bearing cause No. 2749 against the Secretary of State of the United States under Section 503 of the Nationality Act of 1940, 8 U.S.C. 903 (R. 50). Judgment was entered against appellants in that case on April 30, 1954.

Under the pleadings of the action, Ma Chuck Moon and Ma Chuck Woon (appellants herein) asserted derivative United States citizenship by virtue of Section 1993 of the Revised Statutes, 8 U.S.C. 6, First Edition (R. 48, 49). As the plantiffs' claim to derivative citizenship relied upon their alleged relationship to Ma Tarn Sun, who they claimed was their father, the issues in the case were confined to the question of identity of the plaintiffs as being the blood sons of Ma Tarn Sun and his wife and as to whether there was

fraud practiced by plaintiffs in claiming to be United States nationals (R. 50). The purpose of the action was to secure a declaratory judgment declaring the plaintiffs to be citizens and nationals of the United States (R. 29, 30, 32, 56, 57).

The action was tried before the District Court for the Western District of Washington, Northern Division. The plaintiffs were permitted to enter the United States from Hong Kong, British Crown Colony, for the purpose of prosecuting the action. Testimony was taken and evidence offered and admitted (R. 50, 51).

The court in its findings of fact found that plaintiffs Ma Chuck Moon and Ma Chuck Woon had perjured themselves in testifying at the trial, and subsequently ordered the case dismissed for lack of sufficient evidence (R. 53, 54). Plaintiffs were subsequently convicted for committing perjury, and were sentenced to the federal penitentiary at McNeil Island for terms of three and one-half and two and one-half years, respectively, with time off for good behavior, which they have served.

Appellants filed an action on February 2, 1955, in the District Court for the Western District of Washington, Northern Division, for a declaratory judgment under Section 360, Immigration and Nationality Act

of 1952, 8 U.S.C. 1503(a), 66 Stat. 273. The purpose of the action was to secure a declaratory judgment declaring the plaintiffs (appellants herein) to be citizens and nationals of the United States (R. 5, 30, 56, 57). This action was originally brought against John Foster Dulles, the Secretary of State of the United States. Subsequently, the District Director of Immigration and Naturalization instituted deportation proceedings against Ma Chuck Moon and Ma Chuck Woon seeking to deport them as aliens who had been convicted of a crime involving moral turpitude within five years after entry. The District Director was then added as a party defendant (R. 17, 18, 19, 20, 26, 27). Thereafter the Attorney General of the United States was also added as a party defendant (R. 43, 44).

Both parties herein filed motions for summary judgment, and oral argument was heard on the motions of both parties on October 24, 1955. On October 25, 1955, plaintiffs' attorney filed a memorandum suggesting that under Rule 21, Federal Rules of Civil Procedure, the Secretary of State might be dropped as a party defendant, under the apparent belief that the doctrine of *res judicata* would not be applicable where the parties were not the same. The court made no decision of the matter for the reason that its disposition of the case did not necessitate a

decision on the question of dropping the Secretary of State as a party defendant (R. 47).

On January 27, 1956, the court entered its judgment of dismissal upon defendants' motion for summary judgment, for the reason that the action was barred by application of the doctrine of *res judicata* (R. 66, 67, 68, 69).

QUESTIONS PRESENTED

1. Is a judgment of dismissal for lack of sufficient evidence, entered after trial upon the merits and without qualification as to prejudice, a judgment upon the merits for the purposes of applying the doctrine of *res judicata?*

2. Does application of the doctrine of *res judicata* bar an action for declaratory judgment instituted under the provisions of 8 U.S.C. 1503(a) after an adjudication on the merits against the plaintiffs in an action for declaratory judgment under the provisions of 8 U.S.C. 903?

SUMMARY OF ARGUMENT

Appellants argue that a judgment rendered against them in a suit for declaratory judgment of their alleged citizenship under the provisions of 8 U.S.C. 903, which was dismissed for lack of suffi-

cient evidence after a trial upon the merits and without qualification as to prejudice, is not a bar to a subsequent action for declaratory judgment of their alleged citizenship under the provisions of 8 U.S.C. 1503(a), which action is the subject of this appeal.

The appellees contend that the judgment of dismissal rendered against appellants in the prior action operates as an adjudication upon the merits and that said dismissal is a bar to the action now before the Court on appeal.

Appellants litigated the issue of their citizenship in an action for declaratory judgment brought under the provisions of Section 503 of the Nationality Act of 1940, 8 U.S.C. 903. No appeal having been taken from the judgment in that case, it became final as to the parties therein and their privies. The present action was subsequently brought to relitigate the status of appellants' citizenship under the provisions of the Immigration and Nationality Act of 1952, 8 U.S.C. 1503(a). The issues in both cases were, therefore, the same. Both actions were brought against officers of the United States Government, and both were, in effect, suits against the United States. Although the action herein appealed is purportedly brought under the Immigration and Nationality Act of 1952 rather than the Nationality Act of 1940, it is nevertheless

barred by reason of application of the doctrine of *res judicata.*

ARGUMENT

I.

Was the judgment entered against appellants in cause No. 2749 an adjudication upon the merits for the purposes of applying the doctrine of res judicata?

Appellants argue that a judgment of dismissal without prejudice is no bar to a subsequent suit on the same cause of action. It is conceded that appellants' statement of the rule is correct. But, as a brief analysis of the facts and applicable law will demonstrate, cause No. 2749 was dismissed with prejudice, and the judgment therein is a bar to this action.

Judgment was entered against the appellants in cause No. 2749 (Western District of Washington, Northern Division) on April 30, 1954, said judgment dismissing the action without qualification. No timely appeal was taken therefrom (R. 32). The judgment of dismissal was entered after a trial upon the merits, the dismissal being for lack of sufficient evidence. Certified copies of the Findings of Fact, Conclusions of Law and Judgment were attached to and incorporated in appellees' affidavit in support of motion for

summary judgment (R. 31 through 41). The affidavit was not controverted.

Rule 41(b), Federal Rules of Civil Procedure, provides in part:

> "*If the court renders judgment on the merits* against the plaintiff, the court shall make findings as provided in Rule 52(a). *Unless the court in its order for dismissal otherwise specifies,* a dismissal under this subdivision and *any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction or for improper venue, operates as an adjudication upon the merits.*" (Emphasis supplied).

Judgment on the merits was rendered in cause No. 2749, as the court specifically held in its findings of fact herein (R. 66). Said judgment, having been rendered on the merits, is a bar to a subsequent action involving the same issues and the same parties and their privies.

> "Briefly stated, the doctrine of res judicata is that an existing final judgment rendered upon the merits, without fraud or collusion by a court of competent jurisdiction, is conclusive of rights, questions, and facts in issue, as to the paarties and their privies, in all other actions in the same or any other judicial tribunal of concurrent jurisdiction." 30 Am. Jur., Judgments, § 161, p. 908.

The rule as thus summarized has received the recognition and support of the Supreme Court of the United States and this Court.

Hatchitt v. United States, 158 F. 2d 754 (C.A. 9 1946);

MacDonnell v. Capital Co., 130 F. 2d 311, cert. denied 317 U.S. 692 (C.A. 9 1942);

Chicot County Drainage District v. Baxter State Bank et al., 308 U.S. 371, 84 L.Ed. 329, 60 S.Ct. 317 (1940);

Dern v. Tanner, 96 F. 2d 401, cert. denied 305 U.S. 621 (C.A. 9 1938);

Grubb v. Public Utilities Commission, 281 U.S. 470, 74 L.Ed. 972, 50 S.Ct. 374 (1930);

Johnson Steel Street-Rail Co. v. Wharton, 152 U.S. 252, 38 L.Ed. 429, 14 S.Ct. 608 (1894).

It is clear that under the provisions of Rule 41(b), Federal Rules of Civil Procedure, the prior adjudication in cause No. 2749 operates as an adjudication upon the merits, and that said judgment is conclusive as to subsequent actions, such as the present one, where the issues are the same as in the prior case and the parties are the same or are in privity with one another.

Rule 41(b) is sufficiently broad to include judgments rendered on the basis of insufficient evidence, but even without the benefit of the rule the courts have applied the doctrine of *res judicata* where judgment has been based on the insufficiency of the evidence.

It is stated in 30 Am. Jur., Judgments, § 213, p. 948:

> "The general rule is that a judgment, in a former action, based upon an insufficiency of evidence is sufficient to support the application of the doctrine of res judicata."

The rule as quoted was cited and applied by the Supreme Court of Appeals of Virginia in *Patterson v. Saunders*, 194 Va. 607, 74 S.E. 2d 204, 207 (1953), and certiorari was thereafter denied by the Supreme Court of the United States, 345 U.S. 998, 97 L.Ed. 1405, 73 S.Ct. 1132.

It is submitted that the lower court in the instant case correctly concluded that no appeal having been taken from the judgment of dismissal for lack of sufficient evidence, the judgment became final as to the issues and parties therein (R. 66, 67).

II.

Does application of the doctrine of res judicata bar an action for declaratory judgment brought under the provisions of 8 U.S.C. 1503(a) after an adjudication on the merits against plaintiffs in an action for declaratory judgment under the provisions of 8 U.S.C. 903?

The action herein the subject of appeal is the second action initiated by plaintiffs against officers of the United States for declaratory judgment declaring their rights of citizenship and nationality. The

first action, cause No. 2749, Western District of Washington, Northern Division, was brought under the provisions of Section 503 of the Nationality Act of 1940, 8 U.S.C. 903 (R. 64). That section in pertinent part provides:

> "If any person who claims a right or privilege as a national of the United States is denied such right or privilege by any Department or agency, or executive official thereof, upon the ground that he is not a national of the United States, such person, regardless of whether he is within the United States or abroad, may institute an action against the head of such Department or agency in the District Court of the United States for the District of Columbia or in the district court of the United States for the district in which such person claims a permanent residence for a judgment declaring him to be a national of the United States."

In the action under the above statute, the plaintiffs alleged that the American Consul General in Hong Kong refused to recognize them as citizens or nationals of the United States and denied them the right to enter the United States. As the American Consul General in Hong Kong is an executive official of the Department of State, John Foster Dulles, the Secretary of State, was named as party defendant, he being the head of said department (R. 55, 56).

In the said action, plaintiffs Ma Chuck Moon and Ma Chuck Woon perjured themselves, and the court,

attaching little, if any, weight to the testimony offered on behalf of plaintiffs, dismissed the action for insufficient evidence.

Appellants subsequently filed an action under Section 360 of the Immigration and Nationality Act of 1952, 8 U.S.C. 1503(a), for a declaratory judgment declaring their alleged status as citizens and nationals of the United States (R. 29, 30). Section 360 of the Immigration and Nationality Act of 1952, 8 U.S.C. 1503(a), is the counterpart, with changes immaterial here, of Section 503 of the Nationality Act of 1940, 8 U.S.C. 903, now repealed. *Samaniego v. Brownell*, 212 F. 2d 891 (C.A. 5 1954).

In part, 8 U.S.C. 1503(a) provides:

> "If any person who is within the United States claims a right or privilege as a national of the United States and is denied such right or privilege by any department or independent agency, or official thereof, upon the ground that he is not a national of the United States, such person may institute an action under the provisions of Section 2201 of Title 28, against the head of such department or independent agency for a judgment declaring him to be a national of the United States, * * *."

Appellants' action under Section 360 of the Immigration and Nationality Act of 1952 sought the

same adjudication as was sought in the prior action under Section 503 of the Nationality Act of 1940 . . . a declaratory judgment of their status as nationals and citizens of the United States. Such actions are authorized under the provisions of both Acts. *Acheson v. Fujiko Furusho*, 212 F. 2d 284 (C.A. 9 1954); *Samaniego v. Brownell*, 212 F. 2d 891 (C.A. 5 1954); *Avina v. Brownell*, 112 F. Supp. 15 (U.S.D.C. Texas, S.D. 1953). From the foregoing it is apparent that the actions, although instituted under different Acts, involved the same issues (R. 56, 66, 67).

The fact that the action herein appealed was instituted against the Attorney General of the United States and the District Director of Immigration and Naturalization as well as the Secretary of State does not remove the action from within the scope of the doctrine of *res judicata*. The prior action under the Act of 1940 as well as the subsequent action under the Act of 1952 are both, in effect, suits against the United States. This for the reason that there is privity between officers of the same government.

> "There is privity between officers of the same government so that a judgment in a suit between a party and a representative of the United States is res judicata in relitigation of the same issue between that party and another officer of the government."

Sunshine Coal Co. v. Adkins, 310 U.S. 381, 402, 84 L.Ed. 1263, 60 S.Ct. 907 (1940).

For other decisions in accord, see

Tait v. Western Md. Ry. Co., 289 U.S. 620, 77 L.Ed. 1405, 53 S.Ct. 706 (1933);

Estevez v. Nabers, 219 F. 2d 321 (C.A. 5 1955);

DiSilvestro v. Gray, 194 F. 2d 355, cert. denied 343 U.S. 930, 72 S.Ct. 765, rehearing denied 343 U.S. 952 (C.A. D.C. 1952);

United States v. Willard Tablet Co., 141 F. 2d 141 (C.A. 7, 1944).

The rule relating to privity among government officials applies in actions brought under 8 U.S.C. 903, as was indicated in *Acheson v. Fujiko Furusho*, 212 F. 2d 284 (C.A. 9, 1954). That decision was rendered in connection with several cases which were before this Court on motions to dismiss for failure to comply with the provisions of Rule 25(d) of the Federal Rules of Civil Procedure relating to the substitution of parties as officers of the United States within six months after a vacancy in office has occurred, the occasion in that case being the succession of John Foster Dulles to Dean Acheson as Secretary of State. The Court considered the nature of actions brought under 8 U.S.C. 903 at length, and in pertinent part, at Page 292 of the decision, observed as follows:

"In no case is there any hint of or expressed reason for extending the abatement doctrine to actions

> wherein *the judgment merely adjudicates the nationality status of the plaintiff which, by the way, is as binding to the world as it is to the defendant officer* who cannot be under any judicial command in relation to the operation of the judgment." (Emphasis supplied).

Again, on page 296 of the same opinion, it is stated:

> "In summation, also, we repeat that since a judgment rendered in a § 903 action cannot be a command to any head of any governmental department to do anything or to refrain from doing anything, *but fixes a status for the plaintiff which all persons inclusive of governmental authorities must respect*, the action does not relate to the 'discharge', i.e., the carrying out, of any official duty." (Emphasis supplied).

From the foregoing, it is clear that the adjudication upon the issue of the appellants' status as citizens in cause No. 2749 under the provisions of 8 U.SC. 903 *was binding on all government officials, they being in privity with one another*, including the appellees.

It is submitted that the issues presented in the case now before this Court on appeal, having been previously adjudicated in cause No. 2749 of the District Court for the Western District of Washington, which prior action involved the same parties or their privies, are now barred from further litigation by application of the doctrine of *res judicata*.

The purpose of applying the doctrine of *res judicata* has been stated with clarity in *Hatchitt v. United States*, 158 F. 2d 754 (C.A. 9 1946), at page 757 of the opinion, by Judge Garrecht for the Court:

> "The appellants misconceive the nature of the doctrine of res judicata when they characterize it as a 'highly technical defense.' In 30 Am. Jur., Judgments, § 165, it is said: 'The doctrine of res judicata may be said to inhere in the legal systems of all civilized nations as an obvious rule of expediency, justice, and public tranquility. Public policy and the interest of litigants alike require that there be an end to litigation which, without the doctrine of res judicata, would be endless. The doctrine of res judicata rests upon the ground that the party to be affected, or some other with whom he is in privity, has litigated, or had an opportunity to litigate, the same matter in a former action in a court of competent jurisdiction, and should not be permitted to litigate it again to the harassment and vexation of his opponent. The doctrine of res judicata not only puts an end to strife, but produces certainty as to individual rights and gives dignity and respect to judicial proceedings.' "

It would seem that the present case is one wherein the rationale of the Court, as set forth by Judge Garrecht, *supra*, is applicable. Appellants, having once presented the issues of their status as citizens and nationals of the United States for judicial determination, should not be permitted to relitigate said issues by bringing another action against defendants, who are different nominally but are nevertheless bound by

the prior judgment. The court below, having once adjudicated the matter before it, recognized the principle and properly applied the doctrine of *res judicata.*

III

Appellants' Argument

Appellants argue that the District Court erred in denying plaintiff's motion for summary judgment, and recite in their brief that the affidavit of Ma Tarn Sun submitted in support of said motion has never been denied. They argue further that the statements contained in the affidavit therefore stand admitted.

The lower court's disposition of the action on the ground of *res judicata* invalidates the argument . . . as consideration of appellants' (plaintiffs below) motion was rendered unnecessary by the court's entering its judgment of dismissal on the ground of *res judicata.* An action may be properly disposed of by judgment of dismissal on the ground of *res judicata* upon motion for summary judgment. *Daley v. Sears, Roebuck & Co.*, 90 F. Supp. 562, affirmed 182 F. 2d 347 (C.A. 6, 1950); *Hatchitt v. United States, supra.*

Appellants' argument that the lower court erred in denying their motion for summary judgment in view of the uncontradicted affidavit in support thereof is invalid for still another reason . . . the District

Court was not required to believe such evidence or accept it as true, even though uncontradicted. *Brownell v. Lee Mon Hong*, 217 F. 2d 140 (C.A. 9, 1954). In view of the particular background of this case, the lower court could very well have declined to grant the appellants' motion for summary judgment, even if the appellees had not interposed the defense of *res judicata*.

That portion of appellants' argument relating to the applicability of the doctrine of *res judicata* has, we believe, been adequately answered in Arguments I and II of our brief, although it may be of some worth to discuss briefly the authorities cited in appellants' brief.

Appellant's reliance on *Tom We Shung v. Brownell*, 227 F. 2d 40 (C.A. D.C. 1955), is not well taken, as that case specifically holds the doctrine of *res judicata* to be inapplicable because the issue before the court had not been previously decided, which holding is contrary to the facts in the present appeal.

Additionally, *Tom We Shung v. Brownell* relates to the right of appellant therein to judicial review of an order of exclusion. The issue before this Court is not whether appellants are entitled to judicial review, but rather one of whether, once having had a judicial determination of their status as citizens, they can again present the same issue to the Court for further

litigation. *Mah Ying Og v. McGrath*, 187 F. 2d 199 (C.A. D.C. 1950), is likewise not in point. That case holds that a judgment in habeas corpus proceedings, upholding the denial by Immigration Service officials of entry into the United States by the appellant therein, not to be a bar of a subsequent action under Section 503 of the Nationality Act of 1940, 8 U.S.C. 903. The reason for such a holding is clear . . . the remedy afforded by habeas corpus is limited to judicial review, while an action under Section 503 requires a trial *de novo*. In the subject case appellants have had recourse to judicial determination in a trial *de novo*, a deciding fact not present in the cited case.

In *Wong Kay Suey v. Brownell*, 227 F. 2d 41 (C.A. D.C. 1955), and the cases presented together therewith, the issue before the Court was whether appellants therein were entitled to prosecute an action under Section 503 of the Nationality Act of 1940, 8 U.S.C. 903, after the effective date of the repeal of that act by the Immigration and Nationality Act of 1952. The Court held the actions survived, in view of the savings clause in the latter act. *Again*, there had been no prior judicial determination of the appellants' status as citizens or nationals of the United States, a fact not present in the subject case which distinguishes it from the cases cited.

While we do not believe that appellants' assertion on page 20 of appellants' brief, relating to recognition by the Immigration and Naturalization Service of the relationship between appellants and Ma Tarn Sun is pertinent to this appeal, it should be noted that the assertion is not in accord with the transcript of record as cited, or the facts of the case. Insofar as we know, the Immigration and Naturalization Service has had no occasion to recognize the appellants as the blood sons of Ma Tarn Sun. The issue may conceivably be raised in some future deportation proceedings against the appellants which would be subject to judicial review, but the issue is not before the Court here.

CONCLUSION

Clearly, the appellants herein have had a full opportunity to prosecute the issue of their status as citizens and nationals of the United States, and have done so. No appeal having been taken from the judgment in cause No. 2749, that judgment became final as to the parties therein and their privies. The subsequent action, herein the subject of appeal, involves the same issues and the same parties and their privies as cause No. 2749; the latter action is now barred from further prosecution by application of the doctrine of *res judicata.*

For the above reasons, it is respectfully urged that the decision of the court below be affirmed.

Respectfully submitted,

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